219
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In the Supreme Court OF THE UNITED STATES.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for Said Territory.

BRIEF FOR APPELLANT

BY

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1902

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

The Grand Jury system was foreign to Hawaiian law under the Republic of Hawaii and the Monarchy which preceded it.

"The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding Judge of the Court before the arraignment of the accused, and such Judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." Section 616, Penal Laws of 1897.

Unanimous verdicts were not required.

"No jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve." Section 1345, Civil Laws of 1897.

The appellee was indicted pursuant to Section 616 above quoted, for murder in the first degree; was tried by a jury of twelve men; was convicted of manslaughter in the first degree, three jurors dissenting, and was sentenced to imprisonment for the term of twenty years,—all between the surrender of Hawaiian sovereignty and the going into effect of the act entitled "An Act to Provide a Government for the Territory of Hawaii," passed by the Fifty-sixth Congress on the 27th day of April, approved on the 30th day of April and taking effect on the 14th day of June, 1900. After the organization of the Territory, the appellee applied to the District Judge of the United States District Court of the Territory of Hawaii for a writ of habeas corpus. He was discharged on the ground that the indictment was contrary to the Fifth Amendment to the Constitution of the United States, and the conviction contrary to the Sixth Amendment.

II.

Assignments of Error.

The Territory appeals upon the following assignments of error:

1st. The Court erred in granting the application for a writ of habeas corpus.

2nd. The Court erred in assuming jurisdiction of the said application for a writ of habeas corpus.

2529

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3rd. The Court erred in holding that the defendant should have been indicted by a Grand Jury.

4th. The Court erred in holding that the verdict of guilty should have been an unanimous verdict.

5th. The Court erred in holding that Article V. of the Amendments to the Constitution of the United States was in force and effect within the boundaries of the Hawaiian Islands on May 4th, 1899 and on May 18th, 1899.

6th. The Court erred in holding that Article VI. of the Amendments to the Constitution of the United States was in force and effect within the boundaries of the Hawaiian Islands on May 4th, 1899 and on May 18th, 1899.

7th. The Court erred in holding that the sentence was null and void.

8th. For other errors appearing upon the record.

III.

ARGUMENT.

Jurisdiction.

Section 86 of the Organic Act of the Territory provides that: "The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." The Supreme Court of the Territory, therefore, for the purposes of appeal to the Supreme Court of the United States, corresponds to the highest court of a state. Seventeen days before the decision

herein appealed from was rendered, the Supreme Court of the Territory held, Justice Galbraith dissenting, that the indictment, trial, conviction and sentence of the appellee were not contrary to the Constitution of the United States, as the Fifth and Sixth Amendments thereof had not at the time of said proceedings been extended to the Hawaiian Islands. *Ex parte Osaki Mankichi*, 13 Haw. 570.

The appellee, having a constitutional right of appeal from this decision by writ of error from the Supreme Court of the United States, it is submitted that the United States District Judge erred in assuming jurisdiction.

I cannot present this branch of the appeal more aptly or more forcibly than by quoting from a decision of the same United States District Judge, rendered October 23rd, 1900, in the matter of the petition of William H. Marshall for a writ of habeas corpus:

"The question presented is: Can this Court, except in very rare and extreme cases, review on habeas corpus the verdict and judgment of the highest Territorial Court of Hawaii, in a criminal question wherein a constitutional question is claimed to be involved, and overrule the action of that Court?

"From the date of the passage of the Judiciary Act of 1867, until now, the Supreme Court of the United States, while always holding that a United States District or Circuit Court had the power in extreme cases to summarily discharge a party from custody who is restrained of his liberty in violation of the Constitution of the United States, yet the same court has uniformly held that except in the most extreme cases the true course for the petitioner was to sue out a writ of error from the Supreme Court of the United States, and thus have the constitutionality of the conviction settled by the only court in the land whose judgment on constitutional questions is final. This rule was adopted because, although the discretionary power existed, yet it was of more than doubtful propriety for a single United States District or

Circuit Judge to interfere with the judicial procedure of a State or Territorial court when dealing with criminal cases.

"It was held in the case of *New York v. Eno*, 155 U. S. 84, that: While the United States courts had the discretionary power to issue the writs of habeas corpus, and to summarily dispose of a party as law and justice requires, 'yet that discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states; and in recognition of the fact that the public good requires that these relations be not disturbed by unnecessary conflicts between courts equally bound to guard and protect rights secured by the Constitution.' * * * "And again: 'Where a circuit court erred in granting the prayer of the petition, the Supreme Court would reverse its action.'

"The court holding in that case, 'that the judgment is reversed with directions to dismiss the writ of habeas corpus and to remand the accused to the custody of the proper authorities.'

"It must be admitted as settled law that this court, like all subordinate courts, is bound by precedent, and peculiarly so where the question involved is one of constitutional law. The Supreme Court of the United States in the very recent case of *Makuson* vs. *Boucher*, 175 U. S. 184, seems to have decided the question of jurisdiction involved in this case beyond dispute. It held as follows: 'We have frequently pronounced against the review by habeas corpus of the judgments of State Courts in criminal cases because some right under the Constitution of the United States was alleged to have been denied to the person convicted and have repeatedly decided the proper remedy was by writ of error. * * * We lately stated the rule,' said the Court, 'and the reasons for it in the cases of *Baker* vs. *Grice*, 169 U. S. 284, and *Tinsley* vs. *Anderson*, 171 U. S. 101-4."

"The court then proceeds to quote approvingly and at length from the latter decision, as well as from *Baker* vs. *Grice*, and adds that: 'The jurisdiction is more delicate, the reasons against its exercise stronger, when a single Judge is

invoked to reverse the decision of the highest court of a state in which the Constitutional rights of a prisoner could have been claimed, and may be were rightly decided; or if not rightly decided could be reviewed and redressed by a writ of error from this court.'

"There is a long line of authorities sustaining the same proposition, that except in peculiarly urgent cases no United States circuit or district court will discharge a prisoner by habeas corpus in advance of the usual and ordinary course by writ of error from the Supreme Court of the United States. (*Pepke* vs. *Cronan*, 155 U. S. 100; *In re Frederick*, 149 U. S. 70-6; *Whitten* vs. *Tomlinson*, 160 U. S. 230, 242; *In re Duncan*, 139 U. S. 449, 454; *In re Wood*, 140 U. S. 278, 289; *Cook* vs. *Hart*, 146 U. S. 183; *In re Loney*, 134 U. S. 372.)

"So also in the case of *In re Spicher*, 43 Fed. Rep. 653, where it was held: 'That where it appears the petitioner is held under the judgment of a state court of competent jurisdiction before this court should grant him a discharge it should be made to appear that the illegality of his detention is beyond fair question, and in all cases where the pivotal point has not been finally decided by the supreme court, but still remains a debatable question, the circuit court should not discharge the prisoner. * * * In such cases the Federal question can be readily presented to the supreme court, and, as there exists this plain and proper remedy, it should be followed.'

"The above decisions which seem to all relate to the States, apply with equal force to the Territories.

"See *Shute* vs. *Keyser*, 149 U. S. 649, where it held: 'An appeal or writ of error lies to this court (the Supreme Court of the United States) from the judgments or decrees of the supreme courts of the territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.'

"See also *Aztec Mining Co.* vs. *Ripley*, 151 U. S. 79.

"For the reasons above given, the Court holds that it cannot assume jurisdiction of this case. But is there a proper

Federal question involved herein? If there is not, then there is an additional reason for not assuming jurisdiction, because it is settled that a writ of habeas corpus must be denied if it is apparent that the only result of its issue would be the remanding of the prisoner to custody. (*In re Boardman*, 169 U. S. 59.)

"The conditions which existed on these islands when annexed to the United States were unusual. This Territory had a civilization peculiar to itself, a government republican in form, with a written constitution, civil and penal statutes, courts of justice with established jurisdiction. It had public schools and other institutions of learning and laws enforcing compulsory education. It was not mere territory lying in mid-ocean, unused, but ready for man's use. It was a free, enlightened state possessing all the attributes of sovereignty, and when, with its consent, the islands were annexed by the United States, not only the lands but the people with their laws and customs were annexed; and by the well-established law of nations, these laws and customs remained in force until new laws were enacted for the government of the Territory. Section 19, Sutherland on Stat. Construc., page 19; Black on Constitutional Law, page 208; *American Ins. Co.* vs. *Canter*, 1 Pet. 541; *Cross* vs. *Harrison*, 16 How. 164-184.)

"These islands although originally a monarchy, had become a republic and the people were somewhat versed in the principles of self-government. So much was this so that Congress waited nearly two years before enacting a law for the government of the Territory. In the meantime no laws were enforced in the Territory of Hawaii but the laws of the Republic of Hawaii. The strong arm of the Federal government was not felt here. The former laws and judicial procedure remained and continued in force until the 30th day of April, 1900, when Congress passed the Enabling Act, which went into effect on the 14th day of June, 1900. This Act, though providing for a different form of government for the new Territory of Hawaii, continued in force many of the former laws of the islands, and prescribed especially: 'That all suits at law and in equity, prosecutions and judg-

ments, existing prior to the passage of this Act, shall continue to be as effectual as if this Act had not been passed. (Section 16 page 6.) "Act to Provide a Government for the Territory of Hawaii."' * * *

* * * * * * * * * * *

"Section 3, Article 6, of the Constitution of the Republic of Hawaii, authorized the legislature to fix the number of jurors required to agree on a verdict in 'offenses less than felonies.'

"In pursuance of this constitutional provision there was enacted by the legislature of the Republic of Hawaii (section 1345, Civil Laws) a law providing that 'no jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve.' * * *

* * * * * * * * * * *

"As before stated, Section 83 of the Act of Congress for the government of the Territory of Hawaii, in part reads as follows: 'That the laws of Hawaii relative to the judicial department including civil and criminal procedure * * * are continued in force, subject to modification by Congress, or the legislature. * * * No person shall be convicted in any criminal case except by unanimous verdict of the jury.'

"One of the amendments of the Enabling Act was to repeal the law authorizing less than unanimous verdicts in criminal cases. But this repealing clause only took effect when the Enabling Act became a law, to-wit: June 14th, 1900, while this petitioner was convicted May 16th, 1900.

"It was held in the case of *Maxwell* vs. *Dow*, 176 U. S. 581, that: 'Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a Grand Jury, are proper to be determined by the citizens of each state for themselves, and do not come within the Four-

teenth Amendment to the Constitution so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and the equal protection of the laws is secured to them.'

"The court finds that petitioner's remedy is by writ of error from the Supreme Court of the United States; and * * * * * * * * * * * * * *

"That a verdict of nine out of twelve jurors was authorized by the law of Hawaii, which law in respect to this feature, was not repealed until June 14, 1900, and after the trial of this case.

"It appearing that no Federal question is presented for the consideration of this court, it is without jurisdiction to entertain the petition for the writ of habeas corpus.

"Let the petitioner be remanded."

Extension of the Fifth and Sixth Amendments.

"That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since." *Ex parte Spies*, 123 U. S. 131 (1887), citing: *Barron* vs. *Baltimore*, 32 U. S. 7 Pet. 243, 247; *Livingston* vs. *Moore*, *Id.*, 469, 552; *Fox* vs. *Ohio*, 46 U. S. 5 How. 410, 434; *Smith* vs. *Maryland*, 59 U. S. 18 How. 71, 76; *Withers* vs. *Buckley*, 61 U. S. 20 How. 84, 91; *Permoar* vs. *Commonwealth*, 72 U. S. 5 Wall. 475, 479; *Twitchell* vs. *Commonwealth*, 74 U. S. 7 Wall. 321, 325; *The Justices* vs. *Murray*, 76 U. S. 9 Wall. 274, 278; *Edwards* vs. *Elliott*, 88 U. S. 21 Wall. 532, 557; *Walker* vs. *Sauvinet*, 92 U. S. 90; *U. S.* vs. *Cruikshank*, *Id.* 542, 552; *Pearson* vs. *Yewdall*, 95 U. S. 294, 296; *Davidson* vs. *New Orleans*, 96 U. S. 97, 101; *Kelly* vs. *Pittsburg*, 104 U. S. 79; *Presser* vs. *Illinois*, 116 U. S. 252, 265.

The status of the Hawaiian Islands with reference to the Fifth and Sixth Amendments, during the period in question, now comes before this court for the first time. The islands were not one of the United States. They were not an organized Territory of the United States. They were not, like Porto Rico and the Philippines, an acquisition from another nation by conquest, purchase or otherwise, of a portion of its domain. They were an independent nation, surrendering their sovereignty and their national property and for an indefinite period awaiting such form of government as Congress might give them. There is no parallel case in the history of the United States, probably not in the history of the world.

They had wholesome laws, an enlightened system of jurisprudence, industries, commerce, wealth, civilization, progress. These conditions were not of recent origin. Life and property had been comparatively secure for more than a hundred years. Compulsory education and constitutional government had existed for nearly sixty years.

It was by no means certain what form of government would be provided for them. The United States was then acquiring huge possessions in the tropics, inhabited by people, for the most part, incapable of self-government. The opinion was widespread that colonies would be created, and that the Hawaiian Islands might be one of them.

The annexation was by contract. The understanding and intentions of the parties are material. If it be urged that an extra session of the legislature might have been called to establish a grand jury system, the answer is irresistible, that such action was within the control of the President of the United States, that it would have involved long delay, and that the result would have been doubtful.

The following order, under date of May 13th, 1899, was received on the 1st day of June, 1899:

"By the President of the United States,

"Executive Order.

"In the exercise of the power conferred upon him by the Joint Resolution of Congress, approved by the President on July 7, 1898, entitled 'Joint Resolution to provide for Annexing the Hawaiian Islands to the United States,' the President of the United States hereby directs that the General Election provided for by the Constitution of the Republic of Hawaii to be held on the last Wednesday in September next, shall not be held. All elective officers whose terms of office shall expire before appropriate legislation shall have been enacted by the Congress of the United States, shall be continued in their offices at the pleasure of the President of the United States.

"In witness whereof, I have caused the seal of the United States to be hereunto affixed.

"Washington, May 13th, 1899.

"WILLIAM MCKINLEY.

"By the President,

"JOHN HAY, Secretary of State."

The foregoing order plainly indicates that the Federal administration, as well as the local administration and the Hawaiian Supreme Court, understood that the established functions of civil government for the repression of crime were still in operation; in other words, that the Fifth Amendment had not been extended.

The historical events culminating August 12th, 1898, further indicate the understanding and intentions of the contracting parties. Article 32 of the Constitution of the Republic of Hawaii provided that: "The President, with the approval of the cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of

America, subject to the ratification of the Senate." The treaty made in pursuance of this provision, ratified by the Hawaiian Senate September 10th, and by President Dole September 11th, 1897, provided that: "Article III.—Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. * * * The municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaty so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The Newlands Resolution, so-called, ratified this treaty on the part of the United States.

The surrender of sovereignty on the part of the Republic of Hawaii, and its acceptance on the part of the United States, was in the following languge:

Minister Sewall said: "Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled 'Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States.' This Joint Resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."

President Dole replied: "A treaty of political union having been made and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America, I, now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice

and friendship of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands."

Whereupon Minister Sewall said: "Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government."

By direction of President Dole the Hawaiian flag was then lowered and the American flag was raised by direction of Minister Sewall.

The Newlands Resolution declared that, "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged. * * * So long * * * as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided for, said government

shall continue to pay the interest on said debt. * * * No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. The President shall appoint five commissioners, * * * who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

In his proclamation, President McKinley, after reciting the terms of the Joint Resolution, declared "that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies. * * * That the municipal legislation of Hawaii (subject to the exceptions set forth in the Joint Resolution) was to remain in force until the Congress of the United States should otherwise determine." The President ended his proclamation with the significant statement, "Under these various provisions the government of the islands will proceed without interruption." Yet it was impossible for the government of the islands to proceed without interruption, if the Fifth and Sixth Amendments to the Constitution of the United States were then extended.

The title of the Organic Act is significant of what Congress understood it was doing: "An Act to Provide a Government for the Territory of Hawaii." Section 83 of said Act is still more significant: "That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impanneling natives of Hawaii only, in civil and criminal cases specified in said

laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impanneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries." This section extends the Fifth and Sixth Amendments to the new Territory in language plainly indicating that Congress understood they had not been extended.

Annexation was by contract between two independent nations. The status of the Hawaiian Islands, pending the organization of the new government for them, must be controlled by the contract. The intention of the parties is the pole star to the interpretation of the contract. Such intention must be determined by their contemporaneous acts and conduct, and by the documentary evidence taken as a whole, not by a forced construction of a single phrase. If we study the contract as a whole in the light of the conditions that existed, is it not clear that all parties understood that law and order were to be maintained without interruption? Is it conceivable that annexation could have been consummated on any different understanding?

"We, the People of the United States * * * do ordain and establish this Constitution for the United States of America." No state can pass any valid act contrary to this Con-

stitution; yet it is settled that the first ten amendments do not apply to states; and that state constitutions and statutes dispensing with grand juries and unanimous verdicts "are not contrary to the Constitution of the United States." It is submitted that the reasoning of Chief Justice Marshall, in *Barron* vs. *Baltimore*, 7 Peters 243, by close analogy, applies to a civilized nation, which, pending the organization of a new government, voluntarily surrendered its old sovereignty.

"The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States." The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government, and not for the government of a foreign nation pending its reorganization as a political subdivision of the United States.

"Each state established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated." The Hawaiian nation established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its government as its judgment dictated.

"The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself, and the limitations on power, not expressed in general terms, are naturally, and we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." The people of the Hawaiian Islands framed such a government for the Hawaiian Islands as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself,

and the limitations on power, not expressed in general terms, are naturally, and, we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes."

"If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the States." If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to a government recently a sovereign nation pending its reorganization as a state, territory, colony or otherwise, by the Congress of the United States.

"It is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." It is universally understood, it is a part of the history of the day, that annexation was not effected without great opposition in the United States, and might have failed but for the Spanish war. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched

over the interests of our country, deemed essential to union, were not adapted to conditions in the Hawaiian Islands, and the lack of accurate information regarding those conditions was universally admitted. In compliance with the sentiment thus generally expressed, to quiet fears thus extensively entertained, the majority in Congress refrained from making greater changes in the government and laws of the Republic of Hawaii than were absolutely essential to the transfer of sovereignty until a commission to be appointed by the President should investigate and report, and sufficient information should be obtained to make an intelligent creation of a new government possible. The amendments in question contained no expression indicating an intention to apply them to a foreign nation which has voluntarily surrendered its sovereignty to the United States, while it is awaiting a reorganization of its civil and political institutions. The court cannot so apply them.

This slight paraphrasing of the words of Chief Justice Marshall shows how strongly his reasoning applies to the conditions which existed between the surrender of sovereignty and the taking effect of the Organic Act. In the light of this reasoning, which has stood the test of sixty-eight years, can it be held that the words "nor contrary to the Constitution of the United States" had a meaning with reference to the Republic of Hawaii different from what they have with reference to the States of the American Union? In the light of the plain intention and understanding of the American Congress, the American Executive and the Hawaiian Government, as proved by documentary evidence, can it be held that what had been a sovereign nation was suddenly deprived of the power to protect itself from its own criminals, until Congress, at some future time, should give it a government?

In the decision appealed from, Judge Estee thus states the main question before the court: "Could a person in the

Territory of Hawaii, between the 7th day of July, 1898, and the 14th day of June, 1900, when the Act for the government of the Territory of Hawaii went into effect, be legally tried for an infamous crime without having been first indicted by a grand jury, as required by Article Fifth of the amendments to the Constitution of the United States, or convicted by less than an unanimous verdict of said jurors, as provided by Articles Sixth and Seventh of said amendments?" It is submitted that no such question was presented in court. There was at that time no government, no subdivision of the United States, known as the Territory of Hawaii. Physically, the Hawaiian Islands were territory, that is, land, in the lawful possession and control of the United States. Politically, they were not a territory of the United States as those words are used and universally understood in the United States. The civic powers which existed were, in the main, remnants of an independent nationality, held and exercised in the name of the Republic of Hawaii by the sanction of the United States, pending the creation of a new government. The question is not whether a person can legally be tried for an infamous crime without presentment by a grand jury, or be legally convicted thereof by a verdict less than unanimous, in a Territory of the United States,—but whether such trial and conviction were legal in the Republic of Hawaii prior to its becoming an organized Territory of the United States.

In the decision appealed from, the learned judge cites *Walker* vs. *New Mexico & S. P. R. R. Co.*, 165 U. S. 593, 596, to the effect that the statutes of the United States declare that no party "shall be deprived of the right of trial by jury in cases cognizable at the common law." "We deem it unnecessary," says the Supreme Court in this case, "to consider the contention of defendant in error, that the territorial courts are not the courts of the United States, and that the

Seventh Amendment is not operative in a territory; for by the Act of April 7th, 1874 (18 Statutes at large 27, Chap. 80), Congress, legislating for all the territories, declared that no party 'shall be deprived of the right of trial by jury in cases cognizable at common law'; and while this may not, in terms, extend all the provisions of the Seventh Amendment to the territories, it does secure all the rights of trial by jury as they existed at common law." The answer to this reference is not only that the Republic of Hawaii was not then a Territory of the United States, but also that the laws of the United States were not extended to the Hawaiian Islands by the Newands Resolution. They were not extended until the passage of the Organic Act, which provides: "Section 5.—That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere within the United States."

In the decision appealed from, the learned judge cites *Mormon Church* vs. *United States*, 136 U. S. 1, to the effect that: "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. * * * It would be absurd to hold that the United States had power to acquire territory and no power to govern it when acquired." The power is unquestionable, including, it is submitted, the power to leave the municipal laws of a newly acquired nation largely *in statu quo* until sufficient investigations can be made to intelligently change them.

In *ex parte Ah Oi*, 13 Haw. 553, Chief Justice Frear makes the following quotation from an opinion of the then Attorney-General of the United States: "The (Newlands)

Resolution is replete with indications that temporarily the relations of the two countries are to continue practically unchanged. Even some of Hawaii's relations with other countries are so to continue; its government is still to exist and collect its revenues; its laws are to remain in force, however, at variance with our laws, and the powers—civil, judicial and military—exercised by its officers are still to be exercised. It is, moreover, plainly apparent that Congress regards the establishment of an American government for and the extension of American laws to the islands as matters to be attended to in the future upon a consideration of the wide separation of the two countries in locality and character."

The Hawaiian courts during the period in question, were neither Federal nor Territorial. The judges held office by appointment from the President of the Republic of Hawaii. The President of the United States did not recommission them. He simply declared, pursuant to the Newlands Resolution, "That the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies."

Mr. Chief Justice Frear, delivering the opinion of the Court in *Ex parte Ah Oi*, 13 Haw. 534, after referring to the prior decisions of the Supreme Court of Hawaii, says: "The only new element introduced consists of the recent decisions of the Supreme Court of the United States in the so-called 'Insular Cases.' But these, as we read them, not only do not tend to show error in the view we have hitherto taken, but, so far as they go, support not only our former conclusion but also our former reasoning in a remarkable degree. * * * In the Insular Cases the only clauses of the Constitution that were involved were those which required that duties 'shall be

uniform throughout the United States' and other closely related clauses. * * * All nine members of the court were apparently of the opinion, * * * that after Porto Rico had been taken by conquest and until the ratification of the treaty of peace, the provision in regard to the uniformity of duties 'throughout the United States' had no application to that island, for though the island was then subject to the sovereignty of the United States and was to be regarded as a part of the United States by other nations, it was not a part of the United States within the meaning of that provision. But the court was divided in opinion as to the application of that provision to that island after the island had been ceded by the treaty, that is, during the period which we have held corresponded to the period in question in the present cases. A minority of four members of the court apparently were of the opinion that Porto Rico then became a part of the United States within the meaning of that provision. * * * Of the majority of five, four, namely, Justices Gray, Shiras, White and McKenna, took the view that Porto Rico remained foreign territory after the treaty, within the meaning of the constitutional provisions then under consideration, and that territory when acquired by the United States, though it became domestic for some purposes, remained foreign for other purposes, until it became incorporated by Act of Congress as an integral part of the United States. According to their view, the Constitution extended fully to newly acquired territory as soon as Congress showed expressly or by implication that the territory was to be deemed thenceforth fully incorporated as an integral part of the United States, but that until such time, the territory was to be regarded as in a transition state—partly domestic and partly foreign—during which period the Constitution was not applicable as a whole. As Mr. Justice Gray said: 'There must, of necessity, be a transi-

tion period.' The other member of the majority, Mr. Justice Brown, was of the opinion that territory became domestic as soon as acquired, but that the Constitution did not fully extend to it until extended by Act of Congress." * * *

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"In *Crossman* vs. *United States*, which was a case directly relating to Hawaii, the Court placed Hawaii during the period in question in the same category with Porto Rico, and, as we have seen in the cases relating to Porto Rico, it held that the Constitution had not become fully applicable there.

"In the cases relating to Porto Rico we find references to Hawaii pointing in the same direction. For instance, Mr. Justice Brown, in *Downes* vs. *Bidwell*, (at page 775) after reviewing the cases of Louisiana and Florida with reference to their transition periods, spoke of Hawaii in much the same way, as follows: 'So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.'

"Mr. Justice White also, speaking for Mr. Justice Shiras and Mr. Justice McKenna as well as for himself, in the same case, apparently took the view that Hawaii did not become incorporated as a part of the United States until the Organic Act took effect. He said (at page 794): 'By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved by which the Hawaiian Islands were given the status of an incorporated territory.'

"The majority of the court in the Insular Cases held that

even the Foraker Act did not incorporate Porto Rico as an integral part of the United States, comprehensive though that act was. That act, besides providing a tariff, established a government for Porto Rico, and a body politic to be called 'The People of Porto Rico,' with executive, legislative and judicial departments. It provided for a governor, secretary, attorney-general, treasurer, auditor, commissioner of the interior and commissioner of education, to be appointed by the President of the United States by and with the advice and consent of the Senate. It provided for a legislature to consist of an executive council and house of delegates, and provided for elections. It provided a judiciary much like that in Hawaii, consisting of the courts of Porto Rico and the District Court of the United States, and made provision for appeals and writs of error to the Supreme Court of the United States 'as from the Supreme Courts of the Territories,' and that 'such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied.' It provided that judicial process should run in the name of 'United States of America, ss: the President of the United States,' and that all officials authorized by the act should 'take an oath to support the Constitution of the United States.' It provided for the substitution of coins of the United States for those of Porto Rico, and for the nationalization of Porto Rican vessels, and that the statutory laws of the United States, not locally inapplicable, should, with certain exceptions, have the same force and effect in Porto Rico as in the United States. And yet the court held that Porto Rico had not been incorporated as a part of the United States so as to make the Constitution fully applicable to that island. How much more then would it seem that Hawaii did not become so incorporated by the Joint Resolution of annexation."

In *De Lima* vs. *Bidwell*, Mr. Justice McKenna, speaking for himself and Mr. Justice Shiras and Mr. Justice White, endorsed the following from the opinion of Mr. Justice Johnson in *American Insurance Co.* vs. *356 Bales of Cotton*, 1

Pet. 511: "It is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these, there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession.*"

In the following lines Mr. Justice McKenna adds: "All the history and utterances of the past declare the same way. And how important those utterances and decisive of the present controversy! They were not the utterances of inattention and ignorance, and therefore to be discarded. They were the utterances of men (to borrow the thought of Benton) whose sacrifices made the Constitution possible, whose genius conceived and wrote it. Shall it be said that the farther time separates us from them the better we understand them,—better than they understood themselves? *American Ins. Co.* vs. *356 Bales of Cotton* came to this court and was argued by Mr. Webster. We may quote what he said. His views were more than those of an advocate. He expressed them elsewhere when a different, if not higher, duty demanded reflection, consideration, and sincerity. 'What is Florida?' he asked. 'It is no part of the United States. How can it

be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.' And, responding to the argument, the court decided through Chief Justice Marshall that the judicial power of the United States, as declared by the Constitution, did not extend to Florida, and the title to 356 bales of cotton was held to pass by a sale under the order of a court, which consisted of a notary and five jurors, established by an act of the governor and council of Florida."

"*Geofroy* vs. *Riggs*, 133 U. S. 258," says Mr. Justice Brown, speaking for the majority of the court, in *Downes* vs. *Bidwell*, "may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations."

Section 1891, Revised Statutes of the United States, provides that: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect in all the *organized* territories, and in every territory hereafter *organized*, as elsewhere within the United States." The very words of this provision are incorporated in the Organic Act of the Territory of Hawaii, Section 5. Does this indicate that the Constitution *ex proprio vigore* came to the Hawaiian Islands with the flag or with the Organic Act?

Mr. Justice Brown, in delivering the opinion of the majority of the court in *Downes* vs. *Bidwell*, said: "It is doubtful

it Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. * * *

* * * "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, (*Minor* vs. *Happersett*, 21 Wall. 162,) and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence and some of which have already been held by the States to be unnecessary to the proper protection of individuals. * * *

* * * "Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what

Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. *We decline to hold that there is anything in the Constitution to forbid such action.*"

Upon this point Mr. Justice White, in delivering his separate opinion in this case, says: "It is insisted, however, conceding the right of the government of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire and immediately to deny its beneficial existence."

As the foregoing paragraphs indicate, certain provisions of the Constitution of the United States undoubtedly go with the flag, at least, if the occupation is not merely temporary, incident to an aggressive war. Such, for example, is the Thirteenth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*"

If the Constitution of the Republic of Hawaii had not de-

clared that: "Involuntary servitude, except for crime, is forever prohibited in this Republic: whenever a slave shall enter the territory of this Republic, he shall be free": if slavery had existed in Hawaii at the time of the change of sovereignty, the Thirteenth Amendment would have abolished it, without waiting for the passage of a congressional act or an extension of the Constitution of the United States as a whole. "Or any place subject to their jurisdiction" are not meaningless words.

Article VI. of the Constitution of the United States provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Yet, although the Constitution of the United States is the supreme law of the land in every state, it is settled beyond controversy that the Fifth and Sixth Amendments do not apply to states. It is respectfully submitted that, in the absence of congressional legislation directly or impliedly extending these Amendments, the like reasons apply with even greater force to a civilized nation which surrenders its sovereignty to the United States, and has nothing but its old legal machinery for protecting itself from anarchy until Congress shall provide a new government.

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